ANTHONY FURBUSH
(Appellee)

v.

C.N. BROWN COMPANY
(Appellant)

and

CANNON COCHRAN MANAGEMENT SERVICES
(Insurer)

Argued: February 5, 2025
Decided: April 30, 2025

Panel Members: Administrative Law Judges Sands, Hirtle, and Smith
By: Administrative Law Judge Sands

[¶1] C.N. Brown Company appeals from a decision of a Workers' Compensation Board administrative law judge (*Chabot, ALJ*) granting Anthony Furbush's Petition for Payment of Medical and Related Services. C.N. Brown argues that the ALJ's decision was not based upon competent evidence, but rather on speculative medical opinions that cannot meet Mr. Furbush's burden of proof. We disagree and affirm the decision.

I. BACKGROUND

[¶2] Mr. Furbush dropped a crate of milk jugs on his right foot on January 13, 2021, while working as a cashier for C.N. Brown. This incident caused an open wound and right foot fracture. The wound subsequently became infected resulting

in five surgeries and ultimately, on February 19, 2021, an amputation of approximately one-third of his right foot.

[¶3] About sixteen months after the amputation, Mr. Furbush was hospitalized with left leg swelling and a blister on the side of his left foot. He was diagnosed with a displaced fracture of the fifth metatarsal with "findings suspicious for chronic wound and osteomyelitis…." Dr. Ryan Hiebert performed left foot surgery consisting of resection of the fifth metatarsal and debridement of the wound on June 8, 2022. Mr. Furbush was released from the hospital on June 19, 2022.

[¶4] Mr. Furbush filed a Petition for Payment of Medical and Related Services alleging that the left foot condition first identified in June of 2022 was causally related to his work injury of January 13, 2021. Dr. Hiebert was deposed on the key issue of causation, and he testified that there were three possible scenarios which may have caused the left foot fracture and infection. First, he testified that it was possible that Mr. Furbush unknowingly broke his left fifth metatarsal on January 13, 2021, and the fracture could have caused the wound which ultimately became infected.[1] Second, Dr. Hiebert testified that the partial amputation to the right foot may have caused Mr. Furbush to place greater pressure on the left foot resulting in either a stress fracture or a wound leading to the infection. Third, he testified that it

[1] Mr. Furbush testified at hearing that his left foot hit the side of an adjacent shelf when he fell after the milk crate hit his right foot, but he acknowledged that he did not treat for the left foot immediately thereafter because "There was no—no real injury."

was possible that the left-foot problems were attributable to Mr. Furbush's underlying, poorly regulated diabetic condition alone.

[¶5] Dr. Hiebert acknowledged that determining the etiology of the left foot condition was made difficult by the fact that he could not determine the age of the fracture. He was also unable to say whether the wound and infection caused the fracture or whether the fracture subsequently caused wound and infection. Nonetheless, he also testified that he felt there was a likely causal relationship between the left foot problems and the work injury:

> Q: I don't want to put words in your mouth, but just to – just so I understand, you think it's likely – more likely than not that his right foot injury in January 2021 with the infection that developed and the resulting amputation has played a causal role in the development of the problems in his left foot in June of 2022?
>
> A: I think it did.
>
> . . . .
>
> Q: [I]n light of your opinion on the diabetes being a major factor or the major factor, do you still think that this injury that he had to his right foot was a significant contributing factor to the development of the ulcer, the infection in his left foot that resulted in your surgery to him in June of 2022?
>
> A: I believe it did.

[¶6] When pressed further, however, he testified as follows:

> [T]he issue for me is that nobody has any evidence, let's say, of any injury to his left foot prior to June 2022 so we're speculating on kind of what, you know, could have caused the wound to his left foot.

> And I'm saying that there's a 51-percent chance that either when he fell at work he might have broke that bone which led us down this path, or there's a chance that—you know, that he injured it and that the surgery from that fall, his right foot surgery putting pressure on it could have also led us down that path…. [I]t's more or less my belief that—that either an initial injury, either—whether it was the day of the fall or the surgery, led us down this path.
>
> I don't know which—which happened, or the third—and I mean, there is—obviously, the third scenario is that just being diabetic or something like that, something else happened and he developed that wound or, you know, he fractured it some other way.

[¶7] The ALJ ultimately relied on Dr. Hiebert's opinion to support the finding that that the right foot injury and amputation was a causal factor in the left foot injury. He also relied on (1) Mr. Furbush's testimony that since the amputation he bears weight primarily on his left foot and he needed to be fitted with orthotics to prevent future ulcers and callouses on the left foot; and (2) medical records noting concerns regarding left foot overuse due to the right foot amputation. The ALJ concluded, "Based upon the testimony, medical records, and opinion of Dr. Hiebert, I find that the employee has met his burden of proving the left foot condition and medical treatment are causally related to his work-related injury of January 13, 2021."

[¶8] Accordingly, the ALJ granted Mr. Furbush's Petition for Payment of Medical and Related Services. C.N. Brown filed a Motion for Findings of Facts and Conclusions of Law, which the ALJ summarily denied. This appeal followed.

II. DISCUSSION

A. Burden of Proof

[¶9] C.N. Brown argues that the evidence the ALJ relied upon, specifically the opinion of Dr. Hiebert, is insufficient as a matter of law to sustain Mr. Furbush's burden of proof. C.N. Brown contends Dr. Hiebert's opinion is speculative and therefore cannot serve as competent evidence to support the ALJ's conclusion.

[¶10] As the petitioner, Mr. Furbush bore the burden to demonstrate on a more likely than not basis that the medical treatment incurred with respect to his left foot was the result of his January 13, 2021, work injury. *See Fernald v. Dexter Shoe Co*., 670 A.2d 1382, 1385 (Me. 1996). "Except in cases where causation is clear and obvious to a reasonable [person] who had no medical training[,] an employee must rely on the opinion of a qualified medical expert to meet his or her burden of proof on the issue of medical causation." *Wickett v. Univ. of Me. Sys.*, Me. W.C.B. No. 17-27, ¶ 8 (App. Div. 2017) (quotation marks omitted). "[A]lthough slender evidence may be sufficient [to meet a burden of proof], it must be evidence, not speculation, surmise or conjecture." *Grant v. Georgia-Pacific Corp*., 394 A.2d 289, 290 (Me. 1978).

[¶11] In *Wickett,* the Appellate Division vacated an ALJ's decision when it was based on a speculative and inconclusive medical opinion. Me. W.C.B. No. 17-27, ¶¶ 13-14. Specifically, the expert physician in *Wickett* testified to a causal

connection that was "a likely possibility" based on a temporal relationship between the work injury and the subsequent need for surgery. *Id.* ¶ 12. The expert admitted that he could only "speculate" and that it was merely a "possibility" that the fall sustained at work resulted in the retroperitoneal mass that ultimately required surgery. *Id.*

[¶12] In vacating *Wickett,* the Appellate Division relied on *Grant v. Georgia-Pacific Corp*., 394 A.2d 289. In *Grant*, the employer filed a petition for review, arguing that the employee had regained a work capacity. 394 A.2d at 289-90. The commissioner agreed based on expert medical testimony that the employee "may try [some work] without heavy lifting" and that "it may be a good idea for [the employee] to try and see what he can do." *Id.* at 290. The Law Court vacated the judgment, holding that such speculative testimony was not sufficient to meet the employer's burden of proof on the issue of work capacity. *Id*.

[¶13] This case, however, is distinguishable from *Wickett* and *Grant.* Dr. Hiebert testified that it was not simply possible, but probable that the work injury of January 13, 2021, contributed to the development of the left foot problems present in June of 2022. Dr. Hiebert answered affirmatively when asked if it was "more likely than not" that the right foot injury in January of 2021 "played a causal role in the development of the problems in his left foot." He reiterated this opinion when asked specifically if the right foot "was a significant contributing factor to the

development of the ulcer, the infection in his left foot." Moreover, while Dr. Hiebert agreed to "speculation" during his deposition, he defined such "speculation" as "a theory based on what the patient has told me over the years and some of my experience that I've seen." This description is entirely incongruous with the conjecture and guesswork which *Wickett* and *Grant* warns of.

[¶14] C.N. Brown further argues that Dr. Hiebert only reached the more probable than not threshold when combining two possible theories, and there is no single cause that Dr. Hiebert has opined to be 51% likely on its own. According to C.N. Brown, Dr. Hiebert's testimony that there is a "51% chance" that the left foot problems were due to *either* an initial fracture at the time of the work injury *or* altered mechanics due to the right foot amputation can only mean that neither theory supports causation on a more likely than not basis. Mr. Furbush contends that Dr. Hiebert's statements convey his belief that both work-related scenarios, considered individually, were more probable than the singular nonwork-related scenario.

[¶15] We are cognizant that Dr. Hiebert's deposition lacks clarity. It was therefore incumbent on the ALJ to consider the larger context in which any inconsistent statements were offered and to construe the intent of the expert physician. *See Oriol v. Portland Hous. Auth*., Me. W.C.B. 14-35, ¶ 12 (App. Div. 2014). In so doing, the ALJ noted that on direct examination, Dr. Hiebert expressly testified that the right foot injury played a causal role in the development of the left

foot problems. Regarding the alternative theories, Dr. Hiebert stated: "It's more or less my belief that—that either an initial injury, either—whether it was the day of the fall or the surgery, led us down this path."

[¶16] Further, the ALJ properly considered the larger evidentiary context of the case, relying on Mr. Furbush's testimony and several notations in medical records wherein Mr. Furbush's physicians recorded concerns regarding left foot overuse due to the right foot amputation, as well as his need for orthotics to prevent an overcompensation injury. While another ALJ may have reached a different conclusion, we find no reversible error in the ALJ's interpretation of Dr. Hiebert's deposition testimony.

III. CONCLUSION

[¶17] The ALJ neither misconceived nor misapplied the law when adopting Dr. Hiebert's opinion. His assessment of Dr. Hiebert's medical findings in the context of the entire deposition and the evidentiary record was neither arbitrary nor without rational foundation. *See Oriol*, Me. W.C.B. No. 14-35, ¶ 13.

The entry is:

The administrative law judge's decision is affirmed.

Any party in interest may request an appeal to the Maine Law Court by filing a copy of this decision with the clerk of the Law Court within twenty days of receipt of this decision and by filing a petition seeking appellate review within twenty days thereafter. 39-A M.R.S.A. § 322.

Pursuant to board Rule, chapter 12, § 19, all evidence and transcripts in this matter may be destroyed by the board 60 days after the expiration of the time for appeal set forth in 39-A M.R.S.A. § 322 unless (1) the board receives written notification that one or both parties wish to have their exhibits returned to them, or (2) a petition for appellate review is filed with the law court. Evidence and transcripts in cases that are appealed to the law court may be destroyed 60 days after the law court denies appellate review or issues an opinion.

Attorneys for Appellant:
Joshua E. Birocco, Esq.
Kayla A. Estes, Esq.
TUCKER LAW GROUP
P.O. Box 696
Bangor, ME 04402-0696

Attorney for Appellee:
Charles E. Trainor, Esq.
DESMOND & RAND
55 Stroudwater St.
Westbrook, ME 04092-4033